***United States Court of Appeals***

***for the Second Circuit***


# PETITIONER'S BRIEF

ORIGINAL

# 74-1579/1568

IN THE

# United States Court of Appeals

FOR THE SECOND CIRCUIT

PETER J. BRENNAN, Secretary of Labor,

*Petitioner,*

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION and UNDERHILL CONSTRUCTION CORPORATION,

*Respondents.*

UNDERHILL CONSTRUCTION CORP. and DIC CONCRETE CORP., Individually and as participants in a Joint Venture known as DIC-UNDERHILL, A JOINT VENTURE,

*Petitioners,*

v.

PETER J. BRENNAN and OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

*Respondents.*

ON PETITIONS TO REVIEW AN ORDER OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## BRIEF FOR UNDERHILL CONSTRUCTION CORP. AND DIC CONCRETE CORP., INDIVIDUALLY AND AS PARTICIPANTS IN A JOINT VENTURE KNOWN AS DIC-UNDERHILL, A JOINT VENTURE

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Nos. 74-1579 and 74-1568

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## QUESTIONS PRESENTED

1. Is employee exposure to a hazard an essential element of proof for violation of the Occupational Safety and Health Act of 1970.

2. Is noncompliance with the standards justified when necessary to permit accomplishment of required work.

3. Was there substantial evidence to support the Commission's conclusion that Dic-Underhill violated 29 CFR 1926.500(d)(1).

4. Was there substantial evidence to support the Commission's conclusion that Dic-Underhill violated 29 CFR 1926.250(b)(1).

5. Is 29 CFR 1926.250(b)(1) applicable where concrete forms are stacked at the edge of a floor where no interior wall exists and are to be hoisted by crane for reuse on another floor.

## STATEMENT OF THE CASE

This case is before the Court pursuant to Sections 11(a) and (b) of the Occupational Safety and Health Act of 1970 (OSHA) (84 Stat. 1590, 29 U.S.C. 651 et seq.) on petition of the Secretary of Labor and cross-petition of Dic-Underhill to review an order of the Occupational Safety and Health Review Commission issued March 7, 1974 (A.49). This Court has jurisdiction under 29 U.S.C. 660(a) and (b), the alleged safety violations having occurred in the Bronx, New York.

## COUNTERSTATEMENT OF THE FACTS

### A. Administrative Evidence and Findings

Dic-Underhill, a joint venture composed of Underhill Construction Corp. and Dic Concrete Corp. was engaged as a subcontractor on the Harlem River Park Housing Project for the construction of the structural concrete portions of four highrise apartment buildings designated Buildings A, B, C and D. It employed approximately 457 workmen on the project (A.51, T.39). *

On November 22, 1972, OSHA compliance officer, Henry Grudzwick, conducted a routine inspection of the project (A.57). At that time the buildings were approximately 21 floors in height (A. 55).

#### (1) Alleged violation of 29 CFR 1926.250(b)(1)

On the 11th floor of Building C, Mr. Grudzwick observed 4" x 4" shoring material approximately 8 feet in length neatly stacked in a pile approximately 4 feet high by 4-1/2 feet wide that extended over the edge of the floor by approximately 1 foot (A.57, A.58). He was unable to recall whether or not the stacked materials were tied down or banded together (T.12). He saw no Dic-Underhill employees on the floor.

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* "(T)" references are to the transcript of testimony taken before Judge Chodes on April 24, 1973, which comprises Vol. I of the Certified Record.

On looking over the edge, Mr. Grudzwick observed bricklayers working on a scaffold alongside the building at the third or fourth floor level and people walking on the ground below none of whom were identified as Dic-Underhill employees (A.58, T.13).

On the 14th floor of Building D, Mr. Grudzwick observed steel braces that are used to tie in forms neatly piled in stacks about 3 feet wide and 3 feet high (A. 58). The pile extended over the edge of the floor by about 1 foot (A.58). Again he could not recall whether the pile was secured (T.16), saw no Dic-Underhill employees on the floor (T. 17) and again saw bricklayers,who were not Dic-Underhill employees, working alongside the building on a scaffold located at the third or fourth floor level (A. 58).

Mr. Grudzwick could not recall whether or not the bricklayers he observed on scaffolding had overhead protection on their scaffolding. He did, however, issue a citation to them because the scaffolding had some of its rails missing (T. 47).

The parties stipulated that the materials were controlled by Dic-Underhill (A.7). No evidence, however, was offered as to who actually created the alleged hazard.

Mr. Grudzwick testified that Mr. Forcino, Dic-Underhill's superintendent on this job, stated the following concerning the location of the stacked forms:

> "Mr. Forcino said he was in the business for forty-three years and that was the only way they ever handled it. They stored it at the edge and when it came time they picked it up and brought it up to other floors where it was needed." (T.30).

This testimony was unrebutted.

(2) Alleged violation of 29 CFR 1926.500(d)(1)

On November 22, 1972, Mr. Grudzwick inspected the fifteenth floor of Building D and found two field engineers, employees of Dic-Underhill, "checking targets" located at the edge of the floor which had no perimeter guarding (A.55). He observed the men had no safety belts or other type of personal safety equipment, and they were standing at the edge of the floor (T.19, T.21). Mr. Grudzwick observed the men at the edge for about one minute (T.49). He admitted

he did not believe the men could do the work they were doing if perimeter protection had been in place (T. 55).

On November 27, 1972, Mr. Grudzwick inspected the seventeenth floor of Building B and saw a man who was standing approximately 15 feet from the edge of the floor and identified himself as a Dic-Underhill employee and who told Mr. Grudzwick he was working on forms (T.22, T.23). Mr. Grudzwick admitted he did not ascertain whether the man was actually assigned to form work on the seventeenth floor (T.51), but relied upon his observation that "it seemed like he was working * * * he had a hammer in his hand." (T. 25). There is no evidence that any other alleged employee of Dic-Underhill was on that floor at that time.

Mr. Grudzwick also inspected the eighteenth floor of Building B on November 27, 1972 where he observed two of Respondent's cement finishers using a Giraffe, a machine with a long extension and a sander on the end, to sand the ceiling. The floor was opensided and had no perimeter guarding and the men had no personal protective equipment. The men were working about ten feet from the edge of the floor (T.26,T.29,A.55).

B. Administrative Proceedings.

On January 3, 1973, the Secretary cited Dic-Underhill for violation of Section 5(a)(2)* of the Act for failing to comply with certain standards promulgated by the Secretary.

Specifically, Dic-Underhill was charged with serious violation of 29 CFR 1926.500(d)(1) and nonserious violation of 29 CFR 1926.250(b)(1) (A.11,A.12).

A penalty of $800 was proposed for the serious violation and $35 for the nonserious violation (A.13). Upon Dic-Underhill's timely contest of the citation and proposed penalty, the Secretary issued a formal complaint before the Occupational Safety and Health Review Commission and the case was heard by an administrative law judge of the Commission on April 24, 1973 (A.51). Mr. Grudzwick was the Secretary's sole witness. The judge issued his decision and order affirming the citation for serious violation of 29 CFR 1926.500(d)(1) and proposed penalty of $600 and vacated the citation and proposed penalty for violation of 29 CFR 1926.250 (b)(1) (A.62, A.63).

The Commission directed review on August 14, 1973, and its decision followed on March 7, 1974, summarily affirming their decision of the administrative law judge over Chairman Moran's dissent as to the Commission's findings as to the violation of 29 CFR 1926.500(d)(1) (a.72, A.73).

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* 29 U.S.C. 654(a)(2)

C. Findings of Commission

The administrative law judge found that Dic-Underhill violated 29 CFR 1926.500(d)(1) and affirmed the citation and proposed penalty of $600. He found that no violation of 29 CFR 1926.250(b)(1) had been established on either of two grounds. First, he held that 29 CFR 1926.250(b)(1) in pertinent part,

> "prohibits storing of material 'within 6 feet of any hoistway or inside floor openings' . . . . In the instant case, the material was stored at the outer edges of the floors. The intent of the standard appears to be to prevent material from falling into openings in the floors, and not to protect material from falling off the floors and outside the building . . . the standard was not violated by the storage of material at the peripheral edges of the floors." (A.58, A.59) (emphasis in original).

Alternatively, the judge held that no violation had occurred because no Dic-Underhill workers "were exposed to the hazard contemplated by the standard, namely, being struck by falling material". (A.59). In support of this result, the administrative law judge stated that "only where employees of a cited employer are affected by non-compliance with a standard can such an employer be in

violation of Section 5(a)(2) of the Act." (A.59). The judge accordingly vacated the Secretary's citation (A.63).

The Commission summarily affirmed noting "the Judge has correctly disposed of all material issues" (A.72). Chairman Moran in a separate opinion concurred with the majority decision as to 29 CFR 1926.250(b)(1) and dissented with respect to 29 CFR 1926.500(d)(1). These petitions for review followed.*

## STATUTE AND REGULATIONS INVOLVED

Sections 5(a) of the Occupational Safety and Health Act, 29 U.S.C. 654(a) provides:

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* Dic-Underhill in its brief to the Commission asserted as one of its defenses that the Secretary failed to meet its burden of proving that the subject subcontract was not exempt under standard 29 CFR 1926.1050 inasmuch as the Secretary failed to offer proof as to when the contract was entered into or negotiated (A.52, A.54). This issue, however, is not raised by Dic-Underhill in this appeal because the record of the proceeding below does not establish that the subject contract or subcontract was in fact entered into or negotiated prior to April 28, 1971.

§654. Duties of employers and employees.

(a) Each employer --

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

29 CFR 1926.250(b)(1) provides:

(b) Material storage.

(1) Material stored inside buildings under construction shall not be placed within 6 feet of any hoistway or inside floor openings, nor within 10 feet of an exterior wall which does not extend above the top of the material stored.

29 CFR 1926.500(d)(1) provides:

(d) Guarding of open-sided floors, platforms, and runways. (1) Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f) (i) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a standard toe-board wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard."

## POINT I

## SECRETARY MUST MEET HIS BURDEN BY SUBSTANTIAL EVIDENCE.

§10(c) of the Act requires the Commission to afford an employer an opportunity for a hearing in accordance with Section 554 of title 5, United States Code.* That section states that an agency shall give parties the opportunity for hearing and decision in accordance with Section 556 of title 5 which provides that a ruling must be supported by reliable probative and substantial evidence.

Rule 73 of the Rules of Procedure promulgated by the Commission provides in pertinent part:

> Rule 73 Burden of proof:
>
> (a) In all proceedings commenced by the filing of a notice of contest, the burden of proof shall rest with the Secretary.**

§11(a) of the Act provides that, upon judicial review the findings of the Commission with respect to fact must be supported by substantial evidence on the record.

The Court of Appeals has so held in Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230 , (C.A.5, July 18, 1974), wherein it was stated:

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* Administrative Procedure Act, Section 5.

** 29 CFR 2200.73

"The substantial evidence standard must be applied in any judicial review of decisions of an administrative agency under this Act. 29 U.S.C. §660(a). The Supreme Court, in Universal Camera Corp. v. Labor Bd., 340 U.S. 474, 477, 71 S. Ct. 456, 459, 92 L.Ed. 456 (1951), has defined 'substantial evidence', as follows:

" 'Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' . . . Accordingly, it 'must do more than create a suspicion of the existence of the fact to be established . . . ' "

See also American Smelting and Refining Co. v. OSHRC and Brennan, F.2d , (C.A.8, No. 73-1721, July 15, 1974).

## POINT II

### THE SECRETARY HAS FAILED TO PROVE VIOLATION OF 29 CFR 1926.500(d)(1) BY SUBSTANTIAL EVIDENCE.

The citation for violation of 29 CFR 1926.500(d)(1) sets forth three specific instances wherein that standard was allegedly violated.

A. In the first instance, Mr. Grudzwick testified that two field engineers or surveyors employed by Dic-Underhill were checking "targets" at the edge of the floor (T.19). He conceded that the men would not have been able to perform the work they were doing had there been perimeter protection in the form of a barricase in place at the time they were doing their work (T.54, T.55). Subsequently, on re-direct examination, the witness admitted he did not really know what the term "checking targets" means (T.57, T.58) but he was certain that the men had to lean over the edge of the building in order to do whatever it was they were doing. This supported his original conclusion that a barricade would make it impossible for the men to perform their work. *

---

* Since the surveyors did not have surveying equipment with them one cannot conclude that they were conducting survey instrument work from the edge of the floor. Presumably, if the engineers or surveyors were checking a target for "tie-up" (T.57) they were affixing an object or making a mark that could be sighted with surveyors' instruments from another location.

No testimony was offered by the Secretary that would tend to prove that the installation of perimeter protection at the time and place of the alleged violation observed by the Compliance Officer would have removed the hazard to which they were exposed. In fact, in order for the surveyors to perform their work, it is clear they would not only have had to remove the barricade to perform their work but they would also have had to thereafter replace the barricade, thus exposing themselves to far greater danger than the brief task required of them.*

Chairman Moran in his dissent appropriately commented on this alleged violation as follows:

> "As to the work of the field engineers, the compliance officer expressed the opinion on cross-examination that they could not have performed their work if perimeter guards had been in place. Although his subsequent testimony indicated that he was not entirely sure that his opinion was correct, that opinion was not rebutted.
>
> "The Commission has held in several cases that noncompliance with the requirements of an occupational safety and health standard is justified when necessary to permit the accomplishment of required work. Secretary of Labor v. Masonry, Inc., OSAHRC Docket No. 2693, November 6, 1973; Secretary of Labor v. La Sala Contracting Company, Inc., OSAHRC Docket No. 1207, February 23, 1973; Secretary of Labor v. DeLuca Construction Corporation, OSAHRC Docket No. 1225, January 10, 1973. In view of the unrebutted testimony of the compliance officer in the instant case, the evidence concerning the activities of the field engineers is insufficient to support the complaint." (A.75)

*The standard cited does not involve the issue of whether or not safety belts should have been used but only whether or not perimeter protection should have been installed at the time and place stated in the citation.

Since the record does not indicate that any other employees of respondent were on that floor at that time there is no indication that respondent violated the cited standard on this occasion.

B. The second instance of an alleged violation of standard 29 CFR 1926.500(d)(1) is based solely upon the testimony of Mr. Grudzwick that he saw one lone man walking around with a hammer in his hand on a floor where no one else was working and who told him he was employed by Dic-Underhill and was working on forms (T.22,T.25).* At the time Mr. Grudzwick observed the "carpenter" he was 15 feet from the edge and not in danger of falling (T.52). No evidence was offered that Dic-Underhill was performing or required to perform any work at that time and place. There is no evidence that the compliance officer saw or heard the man using his hammer or otherwise working. Thus, there is serious doubt that the man was an employee of the respondent and, if in fact he was, that he was authorized to be on that floor at that time. Certainly Dic-Underhill cannot be held responsible under the Secretary's standards for hazards located in areas in which its employees are not authorized to work.

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* No evidence appears in the record as to the man's name.

Furthermore, it is not reasonable to conclude that the man would go near the edge inasmuch as there is no evidence that there was carpentry work required to be done at or near the edge.

Since there is no substantial evidence to support the conclusion that there was employee exposure to the hazard at the time and place of the alleged violation, the citation must fail.

Chairman Moran commented on the evidence offered by the Secretary with respect to the facts described in paragraphs B and C of this Point II as follows:

> "As to the other three workers, no evidence was introduced to show that their jobs required them to move from the locations where they were observed to positions closer to the edge of the floors on which they were working. The lack of this evidence is a fatal deficiency in the proof required to establish a violation of the Act.
>
> "The Congressional intent behind the Act is to protect working people from hazards at their place of employment. Secretary of Labor v. City Wide Tuckpointing Service Co., OSAHRC Docket No. 247, May 24, 1973. In this connection, the following remarks in Secretary of Labor v. A. Munder & Son, Inc., OSAHRC Docket No. 1858, May 22, 1973, are applicable:

'The crux of any violation is whether there has been employee exposure to an unsafe working condition rather than the fact that specifications of a standard have not been followed . . . . There could have been no employee injury without exposure to the hazard for which the standard was promulgated. Since the primary objective of the standards is to protect employees, the objective would have been achieved by employer restraint on the actions of his employees.'

"In this case, there is no evidence that the three workers were required to move closer than 10 feet from the floor perimeters in order to accomplish their work. The fact that they could have moved closer is not controlling. Therefore, as was held in Munder, evidence of work performance at distances of 10 feet or more from the edge of a floor, standing alone, is not sufficient to establish that the carpenter and the two cement finishers were in any danger. See Secretary of Labor v. Ellison Electric, OSAHRC Docket No. 412, June 7, 1972." (A.75)

C. The evidence offered with respect to that portion of the citation for violation of 29 CFR 1926.500(d)(1) that pertains to two men who were standing approximately 10 feet from the edge sanding the ceiling with a sanding machine also fails to establish employee exposure to the alleged hazard (T.26,T.28).

No testimony as to the obligations of Dic-Underhill with respect to the nature and extent of its work was offered. It cannot be concluded that these men would work at the edge of the building because, in order to do so, it must be assumed the men were going to sand the entire ceiling. It is more likely that they were only working on isolated rough spots in the concrete ceiling and not the entire ceiling because a project of

this magnitude would require a far greater labor force than two men.

Accordingly, the Secretary failed to meet his burden of proof by substantial evidence the alleged violations of 29 CFR 1926.500(d)(1).

## POINT III

SECRETARY HAS FAILED TO PROVE A VIOLATION OF 29 CFR 1926.250(b)(1) BY SUBSTANTIAL EVIDENCE.

A. Section 5(a)(1) of the Act imposes the following duty upon an employer:

> "Sec. 5. (a) Each employer --
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;" *

Section 3 of the Act sets forth the following definitions:

> "Sec. 3. For the purposes of this Act --
>
> (5) The term "employer" means a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State.
>
> (6) The term "employee" means an employee of an employer who is employed in a business of his employer which affects commerce." **

There is no evidence that Dic-Underhill failed to take appropriate measures to assure protection for its employees from the alleged hazard. Furthermore, there is no evidence that any Dic-Underhill employee was working or likely to pass directly under the alleged hazard while it existed nor is there

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* 29 U.S.C. 654(a)(1)

** 29 U.S.C. 652(5), 652(6)

any evidence that would justify an inference of potential exposure to the alleged hazard.

Instead, the testimony of the compliancw officer clearly establishes that with respect to the two alleged violations of Standard 29 CFR 1926.250(b)(1), he did not see any employees of the respondent on the floor where the alleged violations took place or in the area where the materials might fall (T.14, T. 16, T. 17). *

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* Chairman Moran, in his dissent to the Commission's decision stated:

"Occupational safety and health standards are not building codes. They are devices for protecting employees from hazard. One can violate the Occupational Safety and Health Act by failing to comply with an occupational safety and health standard - but one cannot be in violation of a standard unless his failure to observe the requirements thereof has thereby exposed one or more of his employees to hazard. In other words, the standards cannot stand alone. They implement the Act and both the Act and the standards must be considered as a single legislative scheme. I am afraid the Commission's decision in this case has failed to take cognizance of this." (A.76).

In Secretary v. Citywide Tuckpointing Service Co., OSHRC No. 247, 1971-73 CCH OSHD para. 15,767 (May 24, 1973), under similar facts the Commission found:

> "Only where employees of a cited employer are affected by noncompliance with an occupational safety and health standard can such employer be in violation of section 5(a)(2) of this Act."

The Commission again expressed its view that the exposure of an employee to the alleged non-compliant condition is essential under the Act in Secretary v. Hawkins Construction Co., OSHRC Docket No. 949, CCH OSHD para. 17,851 (May 20, 1974). It stated:

> "The purpose of the Act, as enunciated by Congress in 29 U.S.C. §651(b), is 'to assure as far as possible every working man and woman in the Nation safe and healthful working conditions . . . ' (emphasis supplied). Read together with 29 U.S.C. §654(a)(2), which states "Each employer shall comply with occupational safety and health standards . . . ," they make it clear that the Act is designed to protect employees, and the duties arising from the Act run from the employer to those employees. Absent from the employee element, a given fact situation cannot give rise to a finding of liability. Indeed, without the presence of employees the allegedly noncompliant conditions fail to constitute a workplace for the purposes of the Act."

See also Secretary v. Humphreys & Harding, Inc., OSHRC Docket No. 621 CCH OSHD para. 17,784 (May 9, 1974).

The Commission, in Secretary v Gilles & Cotting, Inc., OSHRC Docket No. 504, CCH OSHD para. 16,763 (October 9, 1973), applied this construction of the legislative intent as follows:

> "By its terms section 5(a) imposes duties on '[e]ach employer' and the term 'employer' is defined (in pertinent part) at section 3(5) as meaning ". . . a person engaged in a business affecting commerce who has employees . . .". The term "employee" is defined at section 3(6) as meaning ". . . an employee of an employer who is employed in a business of his employer which affects commerce."
>
> By using these terms Congress evidenced its intent that the obligations imposed by section 5(a) are predicated upon the existence of an employment relationship as between the obligated party (the employer) and the recipients of the benefits of the obligations."

Even the Secretary of Labor has promulgated an interpretive regulation supportive of the Commission's views on this previse question at 29 CFR 1910.5(d) wherein the regulation states:

> "(d) In the event a standard protects on its face a class of persons larger than employees, the standard shall be applicable under this part only to employees and their employment and places of employment."

Thus, since the respondent was not an "employer" having "employees" exposed to the alleged hazard complained of, there can be no violation.

Secretary v. Citywide Tuckpointing Service Co., supra, OSHRC No. 247, 1971-73 CCH OSHD para. 15,767 (May 24, 1973).

Secretary v. Hawkins Construction Co., supra, OSHRC Docket No. 949, CCH OSHD para. 17,851 (May 20, 1974).

Secretary v. Humphreys & Harding, Inc., supra, OSHRC Docket No. 621 CCH OSHD para. 17,784 (May 9, 1974).

Secretary v. Gilles & Cotting, Inc., supra, OSHRC Docket No. 504, CCH OSHD para. 16,763 (October 9,1973).

Secretary v. Martin Iron Works, Inc., OSHRC No. 606, 3 CCH OSHD para. 18,164 (July 1, 1974).

B. 29 CFR 1926.250(b)(1) by its very terms is limited to either "materials stored inside buildings" or to materials stored near an "exterior wall which does not extend above the top of the material".

As expressed in the decision of the administrative law judge, the intent of the standard appears to be to prevent material from falling into openings in the floors and not to protect materials from falling off the floors and outside the building (A.58). In the instant case, the materials were stacked at the outside edge of the floor and in fact extended approximately 1 foot from the edge. Furthermore, no exterior walls had been erected at the floors where the alleged violation occurred (T.16). The brick masons were only at the third or fourth floor level (T.13, T.17).

It is also to be noted that the standard specifically refers to "stored materials". It is obvious that the materials in the instant matter (concrete forms) were not "stored" in any realistic sense of the word. It is obvious that the forms had been stacked after use and were waiting to be hoisted by crane to a higher floor to be used again (T.30). It is also obvious that the materials were neatly arranged so that one end of the stack extended beyond the edge of the building to facilitate the hoisting operation.

It is interesting to note that the Secretary failed to offer any evidence as to how the stacked forms could be raised to a higher floor by a crane and cable if the stack was not placed close to the edge of the floor.* If one is to be bound by the Secretary's interpretation of the standard, it would be necessary for the cable and hook of the crane to extend more than 10 feet into the building in order to be attached to the stacked forms. In view of the fact that ceilings would obviously be damaged or interfere with the crane cable, this procedure is obviously impossible.

Accordingly, the Secretary failed to meet his burden of proving by substantial evidence the alleged violations of 29 CFR 1926.250(b)(1).

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* Mr. Grudzwick, the Secretary's sole witness, was not experienced in building construction or safety procedures relating thereto (T.46).

## CONCLUSION

For the foregoing reasons that part of the Order of the Review Commission that vacates the violations of 29 CFR 1926.250(b)(1) and penalties should be affirmed and that part of the Commission's Order that affirms the citation and penalty for serious violation of 29 CFR 1926.500(d)(1) should be reversed.

Dated, New York, New York,
October 1974.

Respectfully submitted,

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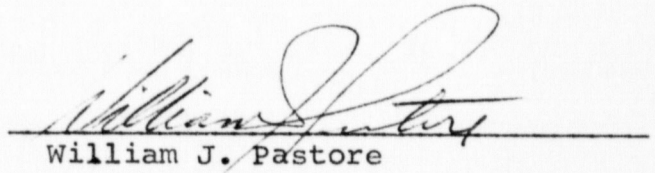

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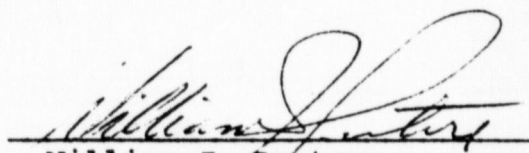

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